IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

APR 20 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80 - 1602

THE ILLINOIS STATE DENTAL SOCIETY, ET AL.,
Petitioners,

v.

HELEN SCHILLER, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinions of the District Court and the Seventh Circuit Court of Appeals are unpublished. These opinions are set forth in the Petitioner's Appendix at pages 11a and 1a respectively.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN AAA DENTAL LABORATORIES, INC. v. ILLINOIS EX REL, CHICAGO DENTAL SOCIETY, 352 U.S. 863 (1956), WHICH WAS DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

II.

THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONSIDERED THE OPINION AND JUDGMENT OF THE ILLINOIS SUPREME COURT OPINION IN PEOPLE v. AAA DENTAL LABORATORIES, 8 ILL. 2d 330, 134 N.E.2d 285 (1956).

STATEMENT OF THE CASE

The following statement of the case is made in order to correct distortions which appear in the statement filed by Petitioners.

Respondents filed a complaint in the United States District Court for the Northern District of Illinois. Their complaint alleged, among other things, that Illinois' statutory scheme regulating dentists was unconstitutional in that it precluded qualified denturists from providing denture care, and advertising directly to the public. The District Court dismissed the Respondents' complaint. Upon appeal, the Seventh Circuit Court of Appeals reversed the District Court decision and remanded for an evidentiary hearing as to whether or not the statute is unconstitutional as applied to Respondents.

A proper statement of the case must be limited to those facts properly pleaded by the Respondents since Petitioners' Motion

to Dismiss concedes all facts properly pleaded. Petitioners include in their petition, statement of facts that are without basis in the record.

The facts in the instant case which are relevant before this Court and included in Respondents' Complaint, are as follows:

1. Respondents are denturists, a group of persons skilled both in the making and fitting of dentures. Denturism is recognized as a distinct profession in many foreign countries. Denturists are allowed to take impressions, manufacture and fit dentures into the oral cavity, and sell dentures directly to the public. Denturism has already been legalized in some states within this country, including Maine and Arizona. Since the filing of the Complaint, denturism has become legal in Oregon and Colorado. (Complaint Count I par. 7).

2. Petitioners are local dental societies and their agents, who have used the Illinois statute to prosecute denturists in violation of 42 U.S.C. §1983.

3. The Illinois Dental Practice Act grants to dentists a monopoly to fit dentures even though Respondents-denturists are qualified to fit dentures safely. The public is thereby harmed because an artificial market is created whereby excessive prices are charged for dentures. (Complaint Count I par. 11).

4. The Respondents-denturists are harmed economically because they are only able to sell dentures to dentists, who control the price at which Respondents' dentures are sold.

5. As a result of this statutory scheme, Respondents-denturists cannot practice their profession. They are economically exploited in the sale of their products at artificially low prices to dentists, while over 50% of the people in the United States who need dentures, chiefly the elderly, are unable to afford them.

Petitioners erroneously assert that such an issue has been decided by the United States Supreme Court and is binding on the

Seventh Circuit as a precedent.

Petitioners' contention that this action is that of dental technicians and not that of denturists is unsubstantiated. The Petitioners' attempt to equate denturists and dental technicians, (Petition for Certiorari, page 2), has no basis in the pleadings nor in the Seventh Circuit's decision. It is a distortion that is used in an attempt to equate the irrelevant facts in AAA Dental Laboratories, Inc. v. Illinois ex rel, Chicago Dental Society, 352 U.S. 863 (1956) and the instant case. A dental technician has only the ability to manufacture the denture while the denturist has that ability, plus the skill to fit the denture to the ultimate user. The relationship of dental technician to denturist is comparable of that of optician to optometrist. The Petitioners must concede, not oppose, before this court the properly pleaded factual existence of Denturism as established in Respondents' Complaint.

Petitioners also contend, on page 5, in their statement of the case, that "AAA had involved a denturist attack". This statement is an attempt to deceive the court, as the AAA case makes no reference to denturists, but rather deals with only dental technicians and dental laboratories.

The question raised by dental laboratories and dental technicians, and presented to the Court in AAA Dental Laboratories v. Illinois ex rel, Chicago Dental Society, 352 U.S. 863 (1956), was whether the Illinois statute, providing a dentist as a necessary broker between the dental technician and the ultimate consumer, created an economic relationship of legal dependancy that violated constitutional protections.

The crucial issue of the ability of denturists, a class of qualified persons who are not dentists, to fit dentures directly to the public was never involved in that litigation. The Seventh Circuit Court of Appeals has only required an evidentiary hearing in order to make that determination.

Petitioners in their arguments have also perpetrated a fraud upon the court by interposing a series of distortions of facts within their arguments.

On page 6, Petitioners allege that the profession of denturism has been held to be a public nuisance. No statute or case has made that determination. Petitioners also assert at page 5 of their petition that one-third of the Respondents have been found to have practiced dentistry without a license in Illinois. There is no basis in the record for such an assertion and it is totally improper. Further, the decision's effect on the dental practice acts of other states is totally irrelevant to whether the Seventh Circuit's decision was proper.

Petitioners also assert on page 10 of their petition that the AAA decision decided the "reasonability of ... The Dental Practice's Act prohibitions against direct dealing by non-dentists with the public." In reality the decision dealt only with the

prohibitions against dental technicians and dental laboratories, not non-dentists.

In addition, Petitioners seek to perpetrate a sophistry on this court when they assert on page 14, that "The Seventh Circuit omitted from its consideration the judgment and opinion of the Illinois Supreme Court in People v. AAA Dental Laboratories", when in fact the opinion makes reference in great detail to that decision.

ARGUMENT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN AAA DENTAL LABORATORIES, INC. v. ILLINOIS EX REL, CHICAGO DENTAL SOCIETY, 352 U.S. 863 (1956), WHICH WAS DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The Seventh Circuit Court of Appeals expressly stated its obligation with respect to application of controlling precedent in its opinion at footnote 2. The Court stated:

> "summary adjudications by the United States Supreme Court are decisions on the merits and if the issues there decided are the same as those raised here, they are controlling precendent. Hicks v. Miranda, 422 U.S. 332, 345 (1975); Chicago Sheraton Corp. v. Zaban,

593 F.2d 808 (7th Cir. 1979). (Emphasis added)

The Court carefully reviewed in great detail the AAA case as shown by the extensive footnote in the opinion. The Court noted that although the constitutionality of the same statute was in question in AAA, the issues involved were different from the instant case. Therefore, summary dismissal of AAA is not dispositive nor binding on the Court.

Specifically, the Court stated:

> "We have examined the jurisdictional statements and pleadings submitted on appeal to the Supreme Court in those cases, and we conclude that the issues on which the Court based its dismissals are not dispositive of the instant case. In AAA Dental Laboratories, v. Illinois ex rel. Chicago Dental Society, 352 U.S. 863 (1956), the due process issue was whether the

statute was rationally related to its purpose where the right of a dental technician to practice his occupation depended solely on whether he was employed by a dentist, without there being any statutory qualifications for technicians or requirement that a dentist supervise their work. The equal protection issue also concerned the lack of statutory qualifications for dental technicians, allegedly resulting in arbitrary decisions by dentists as to which technicians would be employed.

The due process and equal protection issues before the Court in Cordak v. Reuben H. Donnelly Corp., 365 U.S. 299 (1961), involved the Act's restriction of advertising by den-

tal technicians in business and telephone directories to name, address, and telephone number listings. Not disputing the legitimacy of preventing technicians from advertising to the public, appellants argued that the law was irrational because it prevented technicians from advertising important information to dentists as well.

In the instant case the issue is whether due process and equal protection are violated because denturists are prevented from providing denture care and advertising directly to the public. That issue is different from those before the United States Supreme Court in the AAA Dental Laboratories and Cordak cases and therefore those decisions are

not controlling." (Emphasis added).

Petitioners seek to persuade the Court that there exists an identity of both facts and legal issues in People ex rel Illinois State Dental Society v. AAA Dental Laboratories and the instant case. Petitioners state on page 8, that:

> "The Court misapprehended the true nature of the issues in AAA and that the purported difference in the case is a 'difference without a distinction.'"

And later on page 13, that:

> "Indeed, the present action seems to be 'on all fours' with the issue raised in AAA."

Respondents assert that the only similarities in these two cases are the fact that the Chicago Dental Society is a party in each and that the same law firm represented them in each case.

The AAA case, involved dental techni-

cians not denturists. While Petitioner seeks to equate the two professions, there is a marked difference.

Stedman's Medical Dictionary, 23 Edition, 1976, defines a denturist as a person other than a dentist, usually a technician, who engages in the practice of the denture phase of prosthodontics.

Petitioners' contention is analogous to arguing that an optician and an optometrist are one and the same. The facts do not support this conclusion. The State of Illinois could not so define the sale, examination and dispensing of eyeglasses to be solely the practice of Opthamology. This would prohibit a person also skilled in making and fitting of eyeglasses, the optometrist, from practicing his profession. Since the Opthamologist is a medical doctor, who treats conditions of the eyes, including the fitting of eyeglasses, and the optometrist is one who fits glasses, but does not treat the eye, to deny the existence of the

optometrist would be to prohibit optometry and exceed those police power guidelines regulating the States.

The same analysis applies to the dentist, denturist and dental technician. All three are capable of making the denture, although the dentist typically has the denture manufactured by a dental laboratory technician. It is only the dentist and denturist who have the skills to make and fit the denture. Thus a denturist not only has the skill to make a denture, but is also capable of fitting that denture to the ultimate consumer -- the denture wearer. The Respondents' contention is that to deny the existence of the denturist would be to exceed the police power of the State of Illinois. The Seventh Circuit has concluded that an evidentiary hearing is necessary to determine whether in fact the Respondents' contentions are correct.

Clearly the facts alleged here involving denturists rights are not the same as

were involved in the AAA case involving dental technicians.

Moreover, the legal issue involved is different as noted by the Court, supra. The issue in AAA was whether ... the statute was rationally related to its purpose where the right of a dental technician to practice his occupation depended solely on whether he was employed by a dentist, without there being any statutory qualifications for technicians or requirement that a dentist supervise their work. Whereas in this case, the issue is whether due process and equal protection are violated because denturists are prevented from providing denture care and advertising directly to the public. The instant case is akin to two cases cited and distinguished by the Illinois Supreme Court in People v. AAA Dental Laboratories, 8 Ill. 2d 330, 134 N.E.2d 285 (1956), People v. Brown, 407 Ill. 565, 95 N.E.2d 888 (1951),

and Schroeder v. Binks, 415 Ill. 192, 113 N.E. 2d 169 (1953). (See Petition for Certiorari pg. 103a).

In those cases, an Illinois statute regulated plumbers and classified them as masters or journeyman. A journeyman plumber could only work if employed or supervised by a master plumber. The Illinois Supreme Court struck down the statute as an unwarranted exercise of police power. The legislative regulations requiring journeyman to be supervised did not protect the public health, safety and welfare.

In People v. AAA Dental Laboratories, supra, the facts alleged did not establish an artificial restraint upon the dental laboratory technicians. They were merely limited in selling the product, they were qualified to make, but not fit, to the dentists. The Illinois Supreme Court held that this restriction related to the private economic relation in the market and not the statutory structure.

In the present case, the fact accepted by Petitioners clearly establish in great detail a hierarchial relationship whereby the denturist is limited by the statute not for the benefit of the public health, safety and welfare, but solely for the benefit of the dentist, in derogation of the public health, safety and welfare. No such evidence directly analogous to the economic injuries condemned in People v. Brown, supra, and Schroeder v. Binks, supra, ever appeared of record in the AAA case.

Certainly, the Seventh Circuit was correct in determining that AAA was not controlling precedent.

II.

THE SEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONSIDERED THE OPINION AND JUDGMENT OF THE ILLINOIS SUPREME COURT OPINION IN PEOPLE v. AAA DENTAL LABORATORIES, 8 Ill. 2d 330, 134 N.E.2d 285 (1956).

Petitioners have extracted, out of context, two statements of the lower court

opinion. Those two statements appear on page 14 of their brief and are as follows:

> We have examined the jurisdictional statements and pleadings submitted on appeal to the Supreme Court in those cases, and we conclude that the issues on which the court based its dismissals are not dispositive of the instant case.

Op., Ct. of App. at n.2 (Appendix, pg. 7a).

and that:

> The rationale of a summary adjudication may not be gleaned from the opinion below.

Id.

Based on these two statements, Petitioners argue that the Court of Appeals did not properly consider the State court opinion in a case they assert is controlling prece-

dent.

Petitioners fail to point out another statement of the court, which makes clear that the court did look at the opinion and judgment of the Illinois Supreme Court case.

The court stated at footnote 2,

> In People v. AAA Dental Laboratories, 8 Ill.2d 330, 134 N.E.2d 285 (1956), the Illinois Supreme Court upheld the statute as constitutional, reversing in part and affirming in part a decision by the Illinois trial court that it was unconstitutional to prohibit dental technicians from selling dentures directly to the public but constitutional to permit only licensed dentists to take the necessary impressions, give

the order or prescription
and fit the dentures in the
patient's mouth.

The court then noted that with respect to the issues in the instant case they would only be bound by a decision of the Supreme Court of the United States. Further the court discussed at length (See Argument I, supra,) the fact that the issues raised in the AAA case were not dispositive of the instant case. Therefore, the AAA case was not controlling. Clearly the Seventh Circuit reviewed the judgment and opinion of the Illinois Supreme Court as well as the jurisdictional statements before the United States Supreme Court. The fact that the court discussed in detail the differences between that case and the instant matter demonstrates their concern with properly applying controlling precedent. From reading the Seventh Circuit opinion, it can only be concluded that the issues in AAA and the instant matter are not the same.

Therefore the Seventh Circuit's decision is correct.

CONCLUSION

For the reasons stated herein, Respondents respectfully pray this Honorable Court deny Petitioners' petition for writ of certiorari.

Respectfully submitted,

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reply brief